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No. 03-1012

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHARON S.,

Petitioner,

v.

ANNETTE F.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice William H. Rehnquist and the Honorable Justices of the Supreme Court of the United States:

Annette F. ("Annette") respectfully submits the following brief in opposition to the Petition for Writ of Certiorari ("Petition" or "Petn.") by Sharon S. ("Sharon").

I. The Issue One Can See Is Not the Real Issue

The Petition leaves the reader wondering what, if any, federal constitutional question Sharon presents. She admits she consented in August 1999 to an adoption by which Annette would become coparent of her son, Joshua. Petn. at 4-7. She admits that more than a year later, she attempted to withdraw her consent. Petn. at 8. She reveals that the California trial court ruled her attempt to withdraw consent was untimely as a matter of law. Petn. at 9. She provides a copy of the statute – CAL. FAM. CODE § 8814.5(b) – that terminated her right to withdraw consent 90 days after the August 1999 adoption placement agreement. Appendix ("App.") at 104-106. And yet she frames her issue for review (Petn. at i) as if this case were a successor to *Troxel v. Granville*, 530 U.S. 57 (2000), in which the jurisdictional fact was the fit single parent's unwavering opposition to grandparental visitation. What gives?

In California, adoptions are founded on the consent of birth parents. *Sharon S. v. Superior Court*, 31 Cal.4th 417, 445 (2003). Sharon consented, and that fact was a key reason why the California Supreme Court concluded that

Troxel did not apply to any of the arguments Sharon has made before the current Petition. *Id.*

To give Sharon full credit, there is a potential federal constitutional question in the Petition, but it lurks in the last sentence of the paragraph below the quotation on page 15. In that part of her argument, Sharon authors the ipse dixit that CAL. FAM. CODE § 8814.5(b) "cannot be employed to hold Sharon's consent may not be revoked." Petn., p. 15 (inappropriate quotation marks omitted). Of course it can. The potential federal constitutional question in this case is whether States labor under a substantive due process restriction on their power to fix a period in which the birth parent's consent is no longer revocable. No amount of innuendo about same-sex relationships can distinguish for due process analysis applying CAL. FAM. CODE § 8814.5(b) here from applying any State's consent withdrawal period to any other adoption. To the contrary, the deprivation of parental rights in most adoptions is complete, but here Sharon consented to, and Annette seeks only, sharing parental rights.

II. The Real Issue Is Not Here

Sharon's primary problem in presenting to the United States Supreme Court the only potential federal constitutional question in this case is that she never submitted it to any California court. Her citation to her papers in the trial court (Petn. at 3) is wrong. Sharon argued that *if* there was no statutory scheme under which her consent was enforceable, due process prevented the State proceeding without her contemporaneous consent. Vol. Three of Exhs. in Support of Petn. for Writ of Mandate at 647. Her citation to her appellate petition (Petn. at 3) is wrong.

Sharon again argued that *if* California statutes did not authorize independent adoption with retention of birth parent rights, due process precluded any other path to adoption. Petn. for Writ of Mandate, pp. 44-45. Answering Annette's petition for review to the California Supreme Court, Sharon again conditioned her constitutional argument on second-parent adoption "not being sanctioned in California law. . ." Ans. to Petn. for Review at 25. Bluntly, one can view this record with an imaging satellite, an electron microscope, or anything in between, and never find a hint of a constitutional attack on the 90-day limit for revoking consent.

Not surprisingly, the California Supreme Court did not discuss an argument Sharon did not articulate. *Sharon S.*, 31 Cal.4th at 444-45. It founded its discussion on Sharon's consent, without considering whether substantive due process restricted the State's legislative discretion to fix a period after which consent could not be withdrawn. Thus, if the constitutional permissibility of the 90-day period has become law of the case, it is because Sharon failed to articulate her position effectively and not because the California Supreme Court rejected it explicitly.

Sharon's failure to frame the issue earlier is no mere technical error. First, she begs the question whether States must afford birth parents a right to withdraw consent at all. Second, had she taken her current position earlier, children's advocates would have arisen with a single voice to denounce it. If a State allows withdrawal of consent at all, fixing a definite termination of that right is essential to the adoption process.

III. The Petition Presents No Worthy Issue

Most of Part 1.A of the Petition contends that the California Supreme Court's decision conflicts with everything from *Troxel* to "virtually the entire history of substantive due process jurisprudence from this Supreme Court." Petn. at 13-17. In contrast, the California Supreme Court's short discussion of substantive due process *distinguished* the limited and defective arguments Sharon made. *Sharon S.*, 31 Cal.4th at 444-45. Part 1.A of the Petition concludes by complaining that the California Supreme Court's decision did not use CAL. FAM. CODE § 8617 to foreclose the possibility that a child could have three legal parents. Petn. at 17. But there is no explanation why parental numerosity is a federal constitutional issue, or how it is presented on this record, or why not foreclosing a result is the equivalent of authorizing it, which the California Supreme Court explicitly disavowed. *Sharon S.*, 31 Cal.4th at 427 n. 6.

Part 1.B of the Petition argues that the California Supreme Court's decision conflicts with decisions of other States. Petn. at 18. Her concession that those decisions involve interpretations of state statutory law is fatal. *Id.* Although the Petition prefaces its concession with "generally," the fact is that the cited cases do not involve substantive due process.

Part 2 of the Petition anticipates that Annette will argue the Petition is premature under 28 U.S.C. § 1257. Petn. at 18-22. Sharon tries to shoehorn herself into the fourth exception to that statute discussed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Petn. at 19-22. The shoe does not fit. First, Sharon would have to show "the federal issue has been finally decided in the state

courts. . . ." *Cox*, 420 U.S. at 482. As demonstrated above, the only potential federal issue has been finally decided only if law of the case applies after Sharon's failure to articulate the issue effectively. Second, Sharon would have to show that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 483. But she cannot find a federal policy unless her consent to Joshua's adoption is somehow vitiated, and since the California Supreme Court's decision does not allow adoption without consent, requiring Sharon to try the validity of her consent in the state courts does not erode any federal policy. Thus, Part 2 of the Petition has proved the Petition cannot survive scrutiny under 28 U.S.C. § 1257.

IV. Conclusion

For the reasons set forth in this Brief in Opposition, Annette F. respectfully requests that the Petition for Certiorari of Sharon S. be denied.

Respectfully submitted,

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